

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CLOANTO CORPORATION, a Nevada  
Corporation

Plaintiff,

vs.

HYPERION ENTERTAINMENT C.V.B.A.,

Defendant.

No. 2:18-cv-00535-JLR

DEFENDANT'S MOTION TO  
CONSOLIDATE

**NOTE ON MOTION CALENDAR:  
July 27, 2018**

Defendant Hyperion Entertainment C.V.B.A. ("Hyperion"), pursuant to Fed. R. Civ. P. 42(a) and LCR 42(a), moves the Court to consolidate this action into a currently-pending action. filed earlier in this District, Case No. 2:18-cv-00381-RSM, *Hyperion Entertainment C.V.B.A. v. Itec LLC, Amiga, Inc., Amino Development Corp., and Cloanto Corporation* (the "381 action").

Plaintiff Cloanto Corporation ("Cloanto") apparently contends the instant action (the "535 action") is the earliest-filed case pursuant to LCR 42(a), so Hyperion has filed in this action, and, as required by LCR 42(b) has filed a Notice in the 381 action. However, the 535

1 action is the later-filed action in this District because it was originally filed in the Northern  
2 District of New York and transferred to this District after the 381 action was filed. *See* Dkt.  
3 #15 in Case No. 2:18-cv-00535 (Order Transferring Case to WD WA).

4 To date, only Cloanto has entered an appearance in the 381 action. The other three  
5 defendants (collectively, the “Amiga Defendants”), which on information and belief are all  
6 entities related to one another, have been served, but have not yet entered an appearance.

#### 7 **Meet-and-Confer Requirement**

8 Pursuant to LCR 42(b), counsel for Hyperion has met and conferred multiple times  
9 with counsel for Cloanto in an effort to reach agreement about consolidation, but to date the  
10 parties have not been able to reach a definitive agreement. Declaration of Robert J. Carlson  
11 (“Carlson Decl”), ¶¶ 9-10. Hyperion’s counsel also met and conferred with counsel  
12 representing Itec LLC, one of the defendants in the 381 action. Itec’s counsel expressed  
13 tentative agreement with consolidation. Carlson Decl. ¶ 10.

#### 14 **Consolidation is Warranted**

15 Rule 42 provides that where actions before the court involve common questions of law  
16 or fact, the court may consolidate, or join for hearing or trial any or all matters at issue. The  
17 court has broad discretion to order consolidation of actions in the same district, despite the  
18 actions being assigned to different judges. *Inv’rs Research Co. v. United States Dist. Court*  
19 *for Cent. Dist. of California*, 877 F.2d 777, 777 (9th Cir. 1989). Consolidation is favored  
20 where it will conserve judicial resources, and result in no prejudice to a party.

21 Hyperion asserts that consolidation of these actions is warranted. The actions involve  
22 common parties, and arise from a common set of facts and circumstances. Carlson Decl. ¶¶ 6-  
23 8. Both actions involve assertion, by Hyperion and Cloanto, of rights in copyrighted software  
24 and associated trademarks. Carlson Decl. ¶¶ 6-8.

1           **No Scheduling Implications**

2           Per LCR 42(b), consolidation should not create any scheduling conflicts or issues in  
3 either case. In this 535 action, the parties have conducted a Rule 26(f) conference but have not  
4 yet submitted a joint status report, and no case schedule has issued. Similarly, in the 381  
5 action, the parties have not submitted a joint status report; moreover, none of the defendants  
6 have, as yet, filed an answer or other response to Hyperion's Complaint. Carlson Decl. ¶10-  
7 11.

8           **Logistics of Consolidated Action**

9           If consolidation is ordered, Hyperion suggests the consolidated action should remain  
10 with the Honorable Ricardo S. Martinez, because both actions subject to consolidation are  
11 related cases to a 2007 action presided over by Judge Martinez, Case No. 2:07-cv-00631-  
12 RSM (closed) (the "2007 action"). That 2007 action, styled as *Amiga, Inc. v. Hyperion VOF*,  
13 was resolved by Stipulated Judgment entered by Judge Martinez on December 14, 2009 (that  
14 document is Exhibit 1 to Hyperion's Amended Complaint in the 381 action, Dkt. # 7-1). The  
15 Stipulated Judgment in the 2007 action granted Hyperion's predecessor certain intellectual  
16 property rights relevant to the disputes at issue in both cases, and Cloanto's Amended  
17 Complaint suggests Cloanto contends it is a successor-in-interest to at least some of the rights  
18 and obligations of Amiga, Inc., the plaintiff in the 2007 action. Because of Judge Martinez'  
19 oversight of and knowledge about the 2007 case, Hyperion proposes the two cases should be  
20 consolidated into the 381 action, and should remain with Judge Martinez for judicial  
21 efficiency.

22           Finally, regarding pleadings, Hyperion suggests that, if consolidation is ordered,  
23 Cloanto should be cast in the position of Plaintiff, and Cloanto's Amended Complaint in this  
24 535 action should be considered the initial pleading. Hyperion should be oriented as the  
25 Defendant, Counterclaimant and Third-Party Plaintiff, and should have leave to amend its  
26 pleadings, such that Hyperion's Answer in this 535 action will serve as answer to Hyperion's

1 Amended Complaint, while Hyperion's Complaint in the 381 action will be recast as a  
 2 Counterclaim (as to Cloanto) and a Third-Party Complaint (as to the Amiga Defendants).  
 3 Hyperion suggests that for the sake of clarity, it should file an amended pleading to combine  
 4 its responses and its affirmative claims into a single document.

5 Wherefore, Hyperion moves the Court for an Order consolidating the 535 and 381  
 6 actions to be heard before Judge Martinez, and authorizing Hyperion to file in the  
 7 consolidated action an Amended Answer, Counterclaim, and Third-Party Complaint within 14  
 8 days of the Court's Order. A proposed form of Order is submitted contemporaneously with  
 9 this Motion.  
 10

11 Respectfully submitted this 10th day of July, 2018.

12 By: s/ Robert J. Carlson

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21 *Attorneys for Defendant*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of July 2018, I caused to have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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